

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7263

SAMUEL JELFO,
JOSEPHINE TAYLOR and
EDISON C. SCHULZ,
on behalf of themselves and
all others similarly situated,
Plaintiffs-Appellants

Civil Appeal Scheduling
Order 75-7263
Docket No. T-4692 --
District Court Civil
Action No. 1973-521 --

-vs-

BRIEF FOR PLAINTIFFS-
APPELLANTS

HICKOK MANUFACTURING COMPANY, INC.,
Defendant-Appellee

TABLE OF CONTENTS

	<u>Page</u>
<u>STATEMENT OF THE CASE</u>	1
<u>STATEMENT OF FACTS</u>	1
<u>THE MOTION FOR CLASS SUIT CERTIFICATION</u>	3
<u>THE DECISION BELOW</u>	5
<u>QUESTION PRESENTED</u>	6
<u>JURISDICTION</u>	6
<u>THE SUBSTANTIVE THEORY OF THE CASE</u>	6
<u>POINT I: THE DECISION BELOW WOULD CONSTITUTE THE DEATH KNELL OF THIS ACTION</u>	8
<u>POINT II: THE DISTRICT COURT ERRED IN HOLDING THAT THERE IS NO SHOWING THAT THE INTEREST OF THE MEMBERS OF THE VARIOUS SUBCLASSES WILL BE FAIRLY AND ADEQUATELY PROTECTED</u>	10
<u>POINT III: THE DECISION BELOW IS CONTRARY TO THE POLICY BEHIND FEDERAL RULES OF CIVIL PROCEDURE 23</u>	16
<u>POINT IV: THIS ACTION SATISFIES THE PREREQUISITES FOR THE MAINTENANCE OF A CLASS ACTION IN RULE 23 (a) OF THE FEDERAL RULES OF CIVIL PROCEDURE</u>	17
(1) THE CLASS IS SO NUMEROUS THAT JOINDER OF ALL MEMBERS IS IMPRACTICABLE	18
(2) THERE ARE QUESTIONS OF LAW OR FACT COMMON TO THE CLASS	19
(3) THE CLAIMS OF THE NAMED PLAINTIFFS ARE TYPICAL OF THE CLAIMS OF THE CLASS	19
(4) THE REPRESENTATIVE PARTIES WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS	19
<u>POINT V: THIS ACTION IS MAINTAINABLE AS A CLASS ACTION UNDER PARAGRAPH (b) OF FEDERAL RULES OF CIVIL PROCEDURE 23</u>	21
(1) PLAINTIFFS-APPELLANTS HAVE SATISFIED PARAGRAPH (1) OF FEDERAL RULES OF CIVIL PROCEDURE 23(b)	23
(A) (i) Plaintiffs-Appellants Have Satisfied Clause	23
(ii) Plaintiffs-Appellants Have Also Satisfied Clause (B)	24

	<u>Page</u>
(2) PLAINTIFFS-APPELLANTS HAVE SATISFIED PARAGRAPH	
(3) OF FEDERAL RULES OF CIVIL PROCEDURE 23(b)	24
(i) Common Questions Of Law Or Fact Predominate	
Over Any Questions Affecting Only Individual Members	25
(ii) A Class Action Is Superior To Other Avail-	
able Methods For The Fair And Efficient Adjudication Of	
The Controversy	27
<u>POINT VI: CLASS ACTION CERTIFICATION IS PROPER IN</u>	
<u>LITIGATION TO COMPEL PENSION PAYMENTS</u>	29
<u>CONCLUSION</u>	30

TABLE OF CASES

<u>Case</u>	<u>Page</u>
<u>Cypress v. Newport News General & Non-sectarian Hosp. Assn., (CA 4th, 1967) 375 F 2d 648</u>	18
<u>Eisen v. Carlisle and Jacquelin, 417 US 156, 94 SCT 2140, 40 LED 2d 732 (1974)</u>	8
<u>Eisen I, 370 F 2d 119 (2nd Cir., 1966), Cert den 386 US 1035 (1966)</u>	10
<u>Fidelis Corp. v. Litton Industries, (SDNY 1968) 293 F Supp. 164, 12 FR Serv. 2d 23 b. 3, Case 8</u>	18
<u>Forbush v. Wallace, D.C. Ala. 1971, 341 F Supp. 217, 405 US 970, aff'd.</u>	18
<u>Harris v. Palm Springs Estates, 329 F 2d 909 (9th Cir., 1964)</u>	16, 25
<u>Mersay v. First Republic Corp. of America, 43 FRD 465, 470 (SDNY 1968)</u>	20
<u>Mullane v. Central Hanover Bank & Trust Co., 339 US 306 (1950)</u>	28
<u>Schneider v. Electric Auto-Lite Company, 456 F 2d 366 (6th Cir., 1972)</u>	29
<u>Van Gemert v. Boeing Company, 259 F Supp. 125, 130</u>	22
<u>Weeks v. Bareco Oil Co., 125 F 2d 84, 90 (7th Cir., 1941)</u>	28



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL JELFO,
JOSEPHINE TAYLOR and
EDISON C. SCHULZ,
on behalf of themselves and
all others similarly situated,
Plaintiffs-Appellants

-vs-

HICKOK MANUFACTURING COMPANY, INC.,
Defendant-Appellee

Civil Appeal Scheduling
Order 75-7263
Docket No. T-4692 --
District Court Civil
Action No. 1973-521 --

BRIEF FOR PLAINTIFFS-
APPELLANTS

STATEMENT OF THE CASE

This is an action for pension and other benefits by three of a number of former employees of the defendant-appellee on behalf of themselves and all others similarly situated.

The appeal before this Court is from an Order by Hon. Harold P. Burke, United States District Judge, that this action may not be maintained as a class action, entered in the United States District Court, Western District of New York, on April 9, 1975.

STATEMENT OF FACTS

Plaintiffs-appellants are former employees of defendant-appellee, HICKOK MANUFACTURING COMPANY, INC., Rochester, New York. Plaintiffs-appellants had vested rights to retirement and other benefits pursuant to Collective Bargaining Agreements negotiated with the defendant-appellee, on their behalf, by the Rochester Independent Union, their former Collective Bargaining Agent.

The Collective Bargaining Agreements stated that the defendant-appellee was to maintain a funded pension for the benefit of plaintiffs-appellants. Article XVIII, Section 10, of the 1970-1972 Agreement between the Union and the Company provided that the defendant-appellee submit a copy of a pension plan to the then existing Independent Union for their approval. The plan was not

disclosed to the Union, was not consented to by the Union, and was not approved by the Union. In fact, the Union requested a copy of the plan, and a copy was never seen by the Union until negotiations for a new Agreement was attempted in 1972.

The said retirement and other benefits were unilaterally reduced, discontinued or repudiated by the defendant-appellee without the assent, consent or agreement of the Rochester Independent Union or the plaintiffs-appellants and others similarly situated herein. During the years 1971-1972, the defendant-appellee gradually discontinued its manufacturing operations in Rochester, New York and continued its manufacturing operations in Arlington, Texas. The job of the plaintiff-appellant, EDISON C. SCHULZ, and all others similarly situated, were terminated by the defendant-appellee as it discontinued its Rochester operations. The plaintiffs-appellants, SAMUEL JELFO and JOSEPHINE TAYLOR, had retired prior to termination.

On or about the 25th day of September, 1972, the defendant-appellee notified former employees of defendant-appellee with vested rights to retirement and other benefits, who were being paid retirement and other benefits pursuant to the said Collective Bargaining Agreements, that they would discontinue or reduce said benefits, and on or about the 1st day of October, 1972, the defendant-appellee did discontinue or reduce the said benefits.

On or about the 25th day of September, 1972, the defendant-appellee notified said employees with vested rights to retirement and other benefits under the said Collective Bargaining Agreements, who were not yet receiving retirement and other benefits, that the Hickok Revised Basic Pension Plan would be discon-

tinued by the defendant-appellee on October 1, 1972. On or about the 1st day of October, 1972, the defendant-appellee did not pay and has not paid said pension and other benefits to those employees with vested rights, who became eligible to receive the said retirement and other benefits after October 1, 1972, pursuant to the said Collective Bargaining Agreements.

On October 25, 1973, this action was instituted in the United States District Court for the Western District of New York in behalf of the plaintiffs-appellants and other employees in the same situation.

The number of employees that would compose the proposed class totals approximately 285 in number.

There were three class representatives as follows:

The plaintiff-appellant, EDISON C. SCHULZ, was a former President of the former Rochester Independent Union, the plaintiff-appellant, JOSEPHINE TAYLOR, was a Secretary of the said Union, and the plaintiff-appellant, SAMUEL JELFO, was a Union Representative, and all three have in the past been elected representatives of the employees of the said defendant-appellee in their dealings with the said defendant-appellee. The Independent Union itself is no longer active.

Paragraph "TWENTY-FIRST" of the complaint stated:

"TWENTY-FIRST: That the plaintiffs will fairly and adequately protect the interests of the Class."

THE MOTION FOR CLASS SUIT CERTIFICATION

Plaintiffs-appellants, by notice of motion in the United States District Court for the Western District of New York, orally argued on January 27, 1975 for an Order certifying this action as

a class action. No transcript was made of the oral argument.

In the affidavit in support of the motion for class suit certification, it was alleged, among other things, that:

"7. The plaintiffs, SAMUEL JELFO, JOSEPHINE TAYLOR and EDISON C. SCHULZ, will fairly and adequately protect the interests of the Class. Mr. SCHULZ was a President of the Union, Mrs. TAYLOR was a Secretary of the Union, and Mr. JELFO was a Union Representative, and all three have in the past been elected representatives of the employees of the company in their dealings with the defendant. The Union itself is no longer active.

8. Since the commencement of this action, it has been diligently prosecuted. Additionally, the firm of Snyder and Snyder has represented the Rochester Independent Union on behalf of the plaintiffs, SAMUEL JELFO, JOSEPHINE TAYLOR and EDISON C. SCHULZ, and all others similarly situated, for many years in their contract negotiations with the defendant. The plaintiffs' counsel have had substantial experience in the field of labor law. We have arbitrated many grievances on behalf of the former employees of the defendant."

In Paragraph "9" of the affidavit in support of the class suit certification motion, plaintiffs-appellants divided the class of approximately 285 persons into three lists of persons: Schedule A, Schedule B and Schedule C:

"A. Retired employees receiving pension benefits, but whose pensions have been reduced. (Schedule A) (160 persons).

B. Employees with vested rights not receiving pensions which includes (a) those with 25 or more years of service and (b) those with 15 years of service, but less than 25 years of service and who were 62 years of age, but less than 65 on date of termination of employment. (Schedule B) (122 persons).

C. Employees whose disability benefits were reduced or cancelled. (Schedule C) (3 persons)."

Plaintiffs-appellants did not refer to the three lists of people in Schedules A, B and C as subclasses.

However, defendant-appellee, in its affidavit in opposition to the class action motion, construed the separate schedules as separate subclasses. Defendant-appellee then argued that there were conflicts between the alleged subclasses in that an award to

one subclass would reduce the amounts to be recovered by other subclasses from the pension plan.

Plaintiffs-appellants, in their reply affidavit, stated, among other things, that:

"That the cause of action in the complaint is based upon breach of the Collective Bargaining Agreement to maintain a funded pension. It was the Company's problem to make up a plan, and if the plan was inadequate or discontinued, they breached the contract and for that the plaintiffs contend they are liable.

The plaintiffs allege in their complaint that the defendant is liable for breach of the Collective Bargaining Agreement. A plan is referred to only in alleging that the defendant gave employees notice it had discontinued the Company plan.

The plaintiffs are not suing on a plan, but on a Collective Bargaining Agreement. They are not contending that more people should be paid under a plan funded by insurance, but that they should receive pension and other benefits from the Company assets. If the Company's plan to pay pension and other benefits does not do so, the Company is still responsible, plan or no plan.

There is no conflict of interest between any of the persons referred to in the plaintiffs' complaint.

They all have vested interests and ask the Court to require the Company to pay benefits the Company had contracted to pay. In no way are the plaintiffs contending they are limited to recovery under a plan they did not approve or consent to."

THE DECISION BELOW

Judge Burke, by Order dated April 8, 1975 and entered April 9, 1975, held that this action could not be maintained as a class action.

His Order was based on one ground:

1. There is no showing that the interest of the members of the various subclasses will be fairly and adequately protected.

On April 25, 1975, Notice of Appeal to this Court from Judge Burke's Order, denying that this action could be maintained

as a class action, was filed in the United States District Court for the Western District of New York.

QUESTION PRESENTED

Did the District Court err in dismissing the action as a class suit?

JURISDICTION

The jurisdiction of this Court is under 28 USC Section 1291. Appeal is taken as a matter of right on the ground that denial of plaintiffs-appellants' motion for an Order that this action be maintained as a class action is the "death knell" of this action.

THE SUBSTANTIVE THEORY OF THIS CASE

Although whether or not this action can be maintained as a class action is a procedural question, and the merits are not now before the Court, a brief statement of the merits of this case will be helpful in understanding the sequence of events listed in the statement of facts.

This action was started in the United States District Court for the Western District of New York by complaint filed October 29, 1973.

The claim or cause of action was breach of contract.

Plaintiffs-appellants are suing for breach of Collective Bargaining Agreements negotiated with the defendant-appellee, on their behalf, by the Rochester Independent Union, their former Collective Bargaining Agent. Plaintiffs-appellants are not suing on any plan established by defendant-appellee pursuant to the Collective Bargaining Agreements. In their complaint, plaintiffs-appellants referred to a plan only in alleging that the defendant-

appellee gave its employees notice it had discontinued the Company plan.

In suing on the Collective Bargaining Agreements, plaintiffs-appellants are seeking to recover pensions and other benefits from the general corporate assets of defendant-appellee. The plaintiffs-appellants are not seeking to recover a limited amount of funds which owed their existence to the Company's plan. Plaintiffs-appellants are not seeking to be paid under the Company's plan. The plaintiffs-appellants have never argued that their recovery is limited to any amounts under the Company's plan. Plaintiffs-appellants never consented or approved of any plan, never sued to enforce any plan and never intend to attempt to enforce any plan. If the Company's plan was inadequate or discontinued, then defendant-appellee breached the Collective Bargaining Agreements.

Plaintiffs-appellants do not seek to increase the number of people entitled to receive payments from a plan of limited funds. Instead, they seek to receive pensions and other benefits from the general corporate assets of defendant-appellee.

Any argument by defendant-appellee that the source of pension payments is the plan and not the general corporate assets of defendant-appellee is a substantive matter. Whether the source of pension payments is the fund or defendant-appellee's corporate assets is a question of fact to be determined at the trial of this action.

Plaintiffs-appellants are seeking to enforce their contractual vested interests to pensions and other benefits, which were in Collective Bargaining Agreements, which were breached by defendant-appellee.

POINT I

THE DECISION BELOW WOULD CONSTITUTE THE DEATH KNELL OF THIS ACTION.

Judge Burke's Decision and Order denied that this action could be maintained as a class action. The denial of class action status would constitute the "death knell" of this action.

In Eisen v. Carlisle and Jacquelin, 417 US 156, 94 SCT 2140, 40 LED 2d 732 (1974), Mr. Justice Powell, writing for the majority, stated:

"A critical fact in this litigation is that petitioner's individual stake in the damage award he seeks is only \$70.00. No competent attorney would undertake this complex anti-trust action to recover for so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."

As in the Eisen case, supra, economic reality dictates that this suit proceed as a class action or not at all. The class members would have no remedy if this action did not proceed as a class action. Many claimants, each with a small claim, will not individually be able to proceed against defendant-appellee. Additionally, plaintiffs-appellants' former Union is inactive. A class action is the only feasible mode of vindicating plaintiffs-appellants' rights. We can confidently assert that few of the members of the class could afford to bring any individual actions. Defendant-appellee is a determined and financially able opponent. It is not just, and it is not fair that plaintiffs-appellants' rights should be sacrificed because the named plaintiffs and others similarly situated lack the financial resources to pursue their rights individually.

None of the members of the proposed class will have any

remedy to obtain their pension and other benefits if Judge Burke's Order is permitted to stand. Rather, the doors of justice will be closed to them without the merits of their case ever being decided by a Court.

It is virtually certain that because of the predominance of common issues and the number of individuals involved, a class action will "achieve economies of time, effort, expense and promote uniformity of decisions as to persons similarly situated." Adv Comms Notes, 39 FRD, 98, 102, 103 (1966). The proposed class constitutes approximately 285 members. Rather than bring 285 different suits, a class action would allow all members similarly situated to bring one suit to decide all questions at the same time concerning their pension rights.

If this suit is not to proceed as a class action, then it will be extremely difficult for plaintiffs-appellants to pursue their case. It will be necessary to obtain retainers from approximately 285 people. This will impose difficulties of communication with members of the class on counsel for the class members. Some of the members of the class do not live in Rochester, New York. Upon information and belief, some of the members of the class are dead. A class action, however, would allow all the issues concerning all of the varied and diverse members of the class to be concentrated in one particular forum at one particular time.

In Eisen, supra, the Supreme Court in effect affirmed the "death knell" doctrine.

Under the "death knell" doctrine where a Court denies certification of a class and orders the suit to proceed as an ordinary action, the representative party can appeal upon a showing

that because of the expense of prosecuting a complex lawsuit and plaintiffs' small potential recovery, the denial of a class certification represents the "death knell" of the case. See Eisen I, 370 F 2d 119 (2nd Circuit 1966) Cert den 386 US 1035 (1966).

Judge Burke's denial of class certification represents the "death knell" of this action because of the expense of prosecuting this complex lawsuit because of the small potential recovery of each of the members of the class and because of the difficulties imposed upon counsel in obtaining retainers and in communicating with so many members of the proposed class were the proposed class members to be joined in an ordinary and not a class action.

Although this is not an anti-trust lawsuit, the issues are complex and new law may be involved. Plaintiffs-appellants are seeking to collect from the general corporate assets of defendant and are not seeking to recover a limited amount in the Company's pension fund.

For all practical purposes, unless Judge Burke's Order is reversed, this lawsuit will be ended--not only for the named class representatives, but for all others similarly situated. Hence, Appellate review of the Order should be allowed, and if the Order is incorrect or clearly erroneous, it should be reversed.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT THERE IS NO SHOWING THAT THE INTEREST OF THE MEMBERS OF THE VARIOUS SUBCLASSES WILL BE FAIRLY AND ADEQUATELY PROTECTED.

In his Order denying class certification, Judge Burke stated:

"There is no showing that the interests of the members of the various subclasses will be fairly and adequately protected under the present status of the case. There is danger of lack of protection for all of the subclasses. There is no showing that any of the named plaintiffs are personally interested in pursuing this case actively.

The motion is in all respects denied."

Judge Burke's holding is incorrect on several grounds. First, he incorrectly attributes to plaintiffs-appellants the effort to certify subclasses. Second, he incorrectly asserts that there is an absence of fair and adequate protection for class members. Third, he incorrectly asserts a lack of active personal interest by the named plaintiffs.

First, with respect to the issue of subclasses, plaintiffs-appellants never moved to certify any subclasses. Plaintiffs-appellants moved to have the entire class of approximately 285 persons certified as a single class. In their motion to determine the plaintiffs' class under Federal Rules of Civil Procedure 23(c)(1), plaintiffs-appellants never referred to any subclasses. However, in order to narrowly define the size and dimensions of the proposed class, plaintiffs-appellants subdivided the class into Schedules A, B and C. Schedule A consisted of approximately 160 persons (retired employees receiving pension benefits, but whose pensions have been reduced). Schedule B consisted of approximately 122 persons (employees with vested rights not receiving pensions which includes (a) those with 25 or more years of service and (b) those with 15 years of service, but less than 25 years of service and who were 62 years of age, but less than 65 on date of termination of employment). Schedule C consisted of approximately 3 persons (employees whose disability benefits were reduced or cancelled).

It should be noted that plaintiffs-appellants referred

to these groups of people by reference to Schedules listing their names, addresses and telephone numbers. Plaintiffs-appellants did not refer to the Schedules as subclasses and never intended to have any of the individual Schedules certified as separate subclasses.

There is a single class, not three different classes. Plaintiffs-appellants refer to the class members by the means of class schedules in order to clarify the composition of the class. A motion was not made to have three subclasses certified. A motion was not made to have three Schedules certified. Rather, a motion was made to have a single class certified.

Second, Judge Burke's statements about fair and adequate protection are clearly erroneous.

Federal Rule of Civil Procedure 23(a)(4) requires that:

"The representative parties will fairly and adequately protect the interests of the class."

Judge Burke stated:

"There is no showing that the interests of the members of the various subclasses will be fairly and adequately protected under the present status of the case."

In the affidavit in support of a motion for class suit certification, it was alleged in Paragraph 7 thereof that:

"The plaintiffs, SAMUEL JELFO, JOSEPHINE TAYLOR and EDISON C. SCHULZ, will fairly and adequately protect the interests of the class. Mr. SCHULZ was a President of the Union, Mrs. TAYLOR was a Secretary of the Union, and Mr. JELFO was a Union Representative, and all three have in the past been elected representatives of the employees of the company in their dealings with the defendant. The Union itself is no longer active."

Moreover, in Paragraph "TWENTY-FIRST" of their complaint, plaintiffs-appellants alleged:

"That the plaintiffs will fairly and adequately protect the interests of the class."

Further, defendant-appellee has no affidavits by members of the proposed class stating that the named parties will not fairly and adequately protect the interests of the class.

In view of the allegation in Paragraph "TWENTY-FIRST" of their complaint, and in view of the statement in Paragraph "7" of their affidavit in support of the motion to have the action certified as a class action, Judge Burke's holding that there is no showing that the interests of the members of the various subclasses will be fairly and adequately protected is clearly erroneous, incorrect and arbitrary.

Thus, in the complaint, and in the affidavit in support of the motion to certify the suit as a class action, there was a clear showing that the named representatives would fairly and adequately protect the interests of the class sufficient to satisfy the statutory requirement of Federal Rule of Civil Procedure 23(a) (4) that "the representative parties will fairly and adequately protect the interests of class."

Furthermore, plaintiffs-appellants' counsel are qualified to protect the interests of the proposed class. Item "8" in plaintiffs-appellants' affidavit in support of the motion to certify the suit as a class action stated:

"8. Since the commencement of this action, it has been diligently prosecuted. Additionally, the firm of Snyder and Snyder has represented the Rochester Independent Union on behalf of the plaintiffs, SAMUEL JELFO, JOSEPHINE TAYLOR and EDISON C. SCHULZ, and all others similarly situated, for many years in their contract negotiations with the defendant. The plaintiffs' counsel have had substantial experience in the field of labor law. We have arbitrated many grievances on behalf of the former employees of the defendant."

Thus, Judge Burke's holding "there is no showing that the interests of the members of the various subclasses will be fairly

and adequately protected under the present status of this case" is clearly erroneous, incorrect and arbitrary and should be reversed.

In his Decision denying plaintiffs-appellants' motion for class suit certification, Judge Burke went on to state that:

"There is a danger of lack of protection for all of the subclasses."

Judge Burke did not explain what he meant by danger of lack of protection. He gave no examples or no illustrations of lack of protection. His conclusion was arbitrary and was not based upon the allegation in Paragraph "TWENTY-FIRST" of plaintiffs-appellants' complaint or Paragraph "7" of plaintiffs-appellants' affidavit in support of the motion for class suit, both of which asserted that there was adequate protection of the interests of the class.

Judge Burke's conclusion that there existed a danger of lack of protection was wrong, incorrect and clearly erroneous on several counts. First, Judge Burke found the existence of subclasses, but as has already been explained, plaintiffs-appellants moved for class certification of a single class and not several subclasses. Judge Burke has assumed that there were, in fact, several subclasses when, in fact, there was only one single class. He then has proceeded to find a danger of lack of protection among subclasses which never existed. Judge Burke's belief that there is a danger of lack of protection for all members of the subclasses is probably based upon the belief that plaintiffs-appellants were seeking to recover a limited amount from a limited plan or fund. He apparently thought that an increase in the award to one subclass would mean a decrease in the award to another subclass. However, plaintiffs-appellants did not seek to increase the number of people

entitled to receive payments from a plan of limited funds. Instead, they sought to receive pension and other benefits from the general corporate assets of the defendant-appellee. Plaintiffs-appellants sued for breach of Collective Bargaining Agreements, not for breach of any funded plan. Plaintiffs-appellants never consented to, approved or agreed to any plan.

Moreover, the argument that the source of pension payments is the plan and not the general corporate assets of the defendant-appellee is a substantive matter.

Whether the source of pension payments is the fund or defendant-appellee's corporate assets is a question of fact to be determined at the trial of this action. Judge Burke had no right to determine this question of fact at the time of the motion for class suit certification. Such a determination of this question of fact, which is a substantive matter, is clearly erroneous and ought to be reversed.

Third, in his Decision denying class suit certification, Judge Burke went onto state that:

"There is no showing that any of the named plaintiffs are personally interested in pursuing this case actively."

The requirement of an active personal interest does not exist in Federal Rules of Civil Procedure 23. Plaintiffs-appellants merely had to satisfy the statutory requirements of Federal Rules of Civil Procedure 23. Judge Burke has invented a rule which does not exist. This is clearly erroneous and arbitrary and ought to be reversed.

Assuming, however, that such a requirement of personal interest is necessitated by the Federal Rules of Civil Procedure,

then such personal interest would surely be found here. The personal interest was enumerated in Paragraph "7" of the affidavit in support of the motion for class suit certification:

"The plaintiffs, SAMUEL JELFO, JOSEPHINE TAYLOR and EDISON C. SCHULZ, will fairly and adequately protect the interests of the class. Mr. SCHULZ was a President of the Union, Mrs. TAYLOR was a Secretary of the Union, and Mr. JELFO was a Union Representative, and all three have in the past been elected representatives of the employees of the company in their dealings with the defendant. The Union itself is no longer active."

Hence, Judge Burke's assertion that no personal interest existed is clearly erroneous on the face of Paragraph "7" of plaintiffs-appellants' affidavit in support of the motion to have the class certified as a class action.

Thus, Judge Burke's Decision denying class suit certification should be reversed because he found subclasses which did not exist, because he found a lack of fair and adequate protection which did exist, because he invented a new requirement of personal interest in a litigation, and because his Decision was arbitrary, incorrect and contrary to a sworn affidavit.

POINT III

THE DECISION BELOW IS CONTRARY TO THE POLICY BEHIND FEDERAL RULE OF CIVIL PROCEDURE 23.

One purpose of class actions is to achieve economies of time, effort and expense. See Harris v. Palm Springs Estate, 329 F.2d 909 (9 Circuit, 1964). To decide in one trial the issue of liability of defendant-appellee for pensions and other benefits to plaintiffs-appellants and approximately 282 others similarly situated surely is more economical than if a separate determination of liability were to be made more than 280 times by the Courts--once

for each member of the proposed class. Judge Burke's Decision implies that separate determinations of questions should be made for each member of the proposed class. This would require more than 280 different lawsuits to be brought. Assuming that the members of the former Union had, in fact, sufficient funds to bring more than 280 different lawsuits, this would surely clog the Courts with excessive and unneeded litigation.

The issue of defendant-appellee's liability for pensions and other benefits need be decided only once.

The Decision below is contrary to the policy behind Federal Rules of Civil Procedure 23 because by denying class action certification it does not promote economy of time, effort and expense, but rather encourages separate lawsuits where the issues in common are substantial. The Decision below should be reversed.

POINT IV

THIS ACTION SATISFIES THE PREREQUISITES FOR THE MAINTENANCE OF A CLASS ACTION IN RULE 23(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In his Decision dated April 8, 1975, Judge Burke stated:

"The motion is in all respects denied."

This is incorrect, wrong, arbitrary and clearly erroneous because plaintiffs-appellants satisfied all the prerequisites to class actions set out in Federal Rules of Civil Procedure 23(a).

Federal Rules of Civil Procedure.

"Rule 23. Class Actions.

(a) Prerequisites To Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

(1) THE CLASS IS SO NUMEROUS THAT JOINDER OF ALL MEMBERS IS IMPRACTICABLE.

Since this proposed class has 285 members who live in different locations throughout the United States, the requirement that joinder of all members would be impracticable is easily met. The rule does not require "impracticality" it requires "impracticability". "Impracticability", as used in the rule, does not mean "impossibility". It refers only to the difficulty or inconvenience of joining all members of the class. Forbush v. Wallace, D.C. Ala. 1971, 341 F Supp. 217, 405 US 970, aff'd.

The size of this class is not speculative. The class herein has about 285 members.

The joinder of 285 people would be highly inconvenient because the massiveness of the proposed class would impose difficulties on plaintiffs-appellants' counsel in communicating with members of the proposed class. Some members of the class do not live in Rochester, New York. Difficulties in communicating with so many people in different locations would render this case protracted and would impose hardships on plaintiffs-appellants' counsel. Moreover, the number of members of the class herein exceeds the minimum number of people for which other class actions have been allowed. In Cypress v. Newport News General & Non-sectarian Hosp. Assn., (CA 4th, 1967) 375 F 2d 648, the Court of Appeals stated that 18 was a sufficiently large number, and in Fidelis Corp. v. Litton Industries, (SD NY 1968) 293 F Supp. 164, 12 FR Serv. 2d 23 b. 3, Case 8, 35 stockholders were found to constitute a class in a securities fraud case.

Finally, joinder is impracticable because, upon in-

formation and belief, some of the members of the class have died.

(2) THERE ARE QUESTIONS OF LAW OR FACT COMMON TO THE CLASS.

A few of the common questions of law are:

A. Whether plaintiffs-appellants, SAMUEL JELFO, JOSEPHINE TAYLOR and EDISON C. SCHULZ, and others similarly situated, have a claim to immediate payment of retirement and other benefits under the contracts negotiated on behalf of them with defendant-appellee.

B. Whether defendant-appellee committed a material breach of the contracts.

Some of the common questions of fact are:

A. Whether plaintiffs-appellants have received any retirement benefits.

B. Whether plaintiffs-appellants have received other benefits.

C. Whether plaintiffs-appellants' jobs were terminated.

Thus, the requirement for questions of law or fact common to the class has been met.

(3) THE CLAIMS OF THE NAMED PLAINTIFFS ARE TYPICAL OF THE CLAIMS OF THE CLASS.

Everyone in the class claims the right to receive retirement and other benefits. Hence, the interest of the class representatives are squarely aligned with the represented group. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of FRCP (1), 81 Harv. L. Rev, 356 (1967).

(4) THE REPRESENTATIVE PARTIES WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS.

Mr. SCHULZ was a President of the Union, Mrs. TAYLOR was a Secretary of the Union, and Mr. JELFO was a Union Representative, and all three have in the past been elected representatives of the employees of the Company in their dealings with defendant-appellee. The representative parties are capable of diligently and thoroughly protecting and pursuing the interests of the class. "The primary criterion is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to assure them due process." Mersay v. First Republic Corp. of America, 43 FRD 465, 470 (SDNY 1968). Plaintiffs-appellants' counsel asserts they will prosecute this action with vigor. The Law Office of Snyder and Snyder has been counsel for the bargaining unit at the defendant-appellee's Rochester Plants for over 20 years, demonstrating confidence in said law firm.

There is no conflict of interest between any of the class of persons referred to in plaintiffs-appellants' complaint. They all have vested interests.

Moreover, plaintiffs-appellants do not seek to increase the number of people entitled to receive payments from a plan of limited funds. Instead, they seek to receive pension and other benefits from the general corporate assets of defendant-appellee.

Plaintiffs-appellants are suing for breach of Collective Bargaining Agreements, not for breach of a funded plan. Plaintiffs-appellants never consented to, approved, or agreed to any plan. If the plan was inadequate or discontinued, defendant-appellee breached the Collective Bargaining Agreements.

Defendant-appellee's argument that the source of pension payments is the plan and not the general corporate assets of defendant-appellee is a substantive matter. Whether the source of pension payments is the fund or defendant-appellee's corporate assets is a question of fact to be determined at the trial of this action. Any such argument is inappropriate at this stage of the action where the sole concern is whether or not plaintiffs-appellants have satisfied the specific procedural requirements set out in Rule 23 of the Federal Rules of Civil Procedure.

Thus, Judge Burke's denying in all respects plaintiffs-appellants' motion for class suit certification should be reversed because plaintiffs-appellants satisfied all of the prerequisites to a class action set out in Rule 23(a) of the Federal Rules of Civil Procedure.

POINT V

THIS ACTION IS MAINTAINABLE AS A CLASS ACTION UNDER PARAGRAPH (b) OF FEDERAL RULES OF CIVIL PROCEDURE 23.

In his Decision dated April 8, 1975, Judge Burke stated:

"The motion is in all respects denied."

This is incorrect, arbitrary and clearly erroneous because plaintiffs-appellants clearly showed to the Trial Court that this action is maintainable as a class action under Paragraph (b) of Federal Rules of Civil Procedure 23.

"Rule 23. Class Actions.

...
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In addition to the four prerequisites of Paragraph (a), plaintiffs-appellants must also satisfy at least one part of Paragraph (b) of Federal Rule of Civil Procedure 23 in order for a suit to be certified as a class action.

The three types of suits that can be brought under Rule 23(b) are not always mutually exclusive. A class action that meets the requirements of either b(1) or b(2) may well satisfy the requirements of b(3).

However, if a class action can be maintained under b(3), but also under b(1) and/or b(2), the Court should order the class action under b(1) or b(2), instead of under b(3).

In Van Gemert v. Boeing Company, 259 F Supp. 125, 130, Judge Ryan said:

"(1) The principal distinction between an action maintained as a class action under 23(b)(3) from those maintained under 23(b)(1) or 23(b)(2) is that in (b)(3) members of the class may request to be excluded from the proceeding and thereby avoid being bound by a judgment against the class. No such option exists to members of a class in an action maintained under Rule 23(b)(1) or (2).

...
It seems apparent that virtually every class action that meets the requirements of 23(b)(1) or 23(b)(2) will also meet the less severe requirements of 23(b)(3). However, where the stricter requirements of 23(b)(1) and 23(b)(2) are squarely presented by the plaintiffs' claims Rule 23(b)(3) is not applicable."

The same point is made in the Manual For Complex Litigation.

"Therefore, it is desirable as well as imperative to classify the suit as a class action under Rule 23(b)(1) or 23(b)(2) when possible, even though it may be classifiable as one under Rule 23(b)(3)."
Manual For Complex Litigation, Section 1.43.

Plaintiffs-appellants believe they have satisfied 23(b)(1) and 23(b)(3). Hence, if the Court agrees that both of the clauses have been satisfied, the Court should certify the proposed class under 23(b)(1).

If the Court believes that the requirements of 23(b)(1) are not met, but the requirements of 23(b)(3) are met, then the Court should certify the proposed class under 23(b)(3).

(1) PLAINTIFFS-APPELLANTS HAVE SATISFIED PARAGRAPH (1) OF FEDERAL RULE OF CIVIL PROCEDURE 23(b).

Section 23(b)(1) has two clauses: (A) and (B). Plaintiffs-appellants must satisfy at least one of the two clauses, that is, either clause (A) or clause (B).

(i) PLAINTIFFS-APPELLANTS HAVE SATISFIED CLAUSE (A).
There is a significant risk of multiple litigations. The numerous individual members of the class could bring separate litigations,

thus creating a risk of separate and possibly inconsistent adjudications against the defendant-appellee. Multiple litigation has the potential of creating incompatible standards of conduct for defendant-appellee.

Inconsistent standards of conduct for defendant-appellee would be extremely inappropriate because there is a high degree of cohesion among plaintiffs-appellants' claims. All of plaintiffs-appellants' claims arise from the same contracts or Collective Bargaining Agreements.

(ii) PLAINTIFFS-APPELLANTS HAVE ALSO SATISFIED CLAUSE (B). This clause means that there need not be any risk of any suit other than the one before the Court because the one suit itself may be dispositive or impair or impede. 7A Wright & Miller Federal Practice & Procedure, Civil, Section 1774, p. 14.

Obviously, the interests of the proposed class members will be directly affected by legal action resulting in a judgment or decree affecting the legal obligations of defendant-appellee to pay retirement and other benefits.

If this action is determined to be a class action, and the class action is lost by plaintiffs-appellants, this suit could be used as a precedent in favor of defendant-appellee in any other subsequent cases brought by any other former employees of defendant-appellee. This suit, if won or lost, will have precedential effects. It will also have Res Judicata effects. Thus, as a practical matter, this class action itself will be dispositive of the interests of other members of the class.

(2) PLAINTIFFS-APPELLANTS HAVE SATISFIED PARAGRAPH (3) OF FEDERAL RULE OF CIVIL PROCEDURE 23(b).

To qualify under b(3), the Court must find (1) questions of law or fact common to the class "predominate over any questions affecting only individual members," and (2) that a class action is "superior" to other available methods.

In the analysis of 23(a)(2), plaintiffs-appellants enumerated several common questions of law and fact. (See Page 19 of this Brief.)

(i) COMMON QUESTIONS OF LAW OR FACT PREDOMINATE OVER ANY QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS. Individual issues concern the exact amount of each member's claim. However, the issue of defendant-appellee's liability to all members of the proposed class is the basis for all claims against the defendant-appellee by members of the proposed class. Thus, the basis for all of plaintiffs-appellants' claims against the defendant-appellee is the same.

The present case is analogous to class actions based upon a violation of the Securities and Exchange Act of 1934, particularly Section 10(b) and regulations promulgated pursuant thereto. In such cases, common issues raised in a class action determine the presence or absence of liability, and once that threshold is passed, the Courts then determine and calculate each specific claim on an individual basis. Such calculations can be easily made after common questions concerning liability of defendant-appellee are decided.

In Harris v. Palm Springs Alpine Estates, 329 F 2d 909 (9th Cir, 1964), class actions were brought for violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. The Court of Appeals held that allegations in the complaint were

sufficient to comply with rules respecting pleading of class actions. In particular, at Page 914, the Court stated:

"(12) The complaints sufficiently allege the presence of the 'common question of law or fact affecting the several rights' of the investors, required by Rule 23(a)(3). General allegations of the presence of such questions are amply supported by the detailed averments of each complaint. The first three counts of each complaint allege a concert of action directed against all of the investors alike. 'All or substantially all' of certain misrepresentations, detailed in the complaint, are alleged to have been made 'by means of advertisements, brochures and prospectuses to each and all of the plaintiffs and investors.' Concealment and omission of the same material facts are alleged as 'to each of the investors.' 'Each of plaintiffs and the other investors' is alleged to have reasonably relied upon the misrepresentations, and to have been misled by the concealment of facts. The additional circumstances relied upon in counts 2 and 3 are alleged to apply to all investors in the 'Secured 10% Earnings Program.' The concerted conduct of defendants is alleged to violate the same provisions of the securities statutes without distinction as among the investors.

(13) Appellees assert that the various investors made payments on the securities at different times and stand in different positions with respect to the representations made to them and the reasonableness of their reliance, and therefore that questions of fact and law will arise which cannot be common to them all. Again, the argument is based upon factual premises which must be established in the trial court, not here. But even assuming these premises to be true, since the complaint alleges a common course of conduct over the entire period, directed against all investors, generally relied upon, and violating common statutory provisions, it sufficiently appears that the questions common to all investors will be relatively substantial. Rule 23(a)(3) 'does not require that all the members of the class be identically situated, if there are substantial questions either of law or fact common to all.' 3 Moore's Federal Practice Section 23.10 at 3454 (2d ed. 1963). Rule 23(a)(3) is based on the assumption that the economy of time, effort, and expense which will result from a common trial of substantial common issues exceeds the additional burden which may be imposed upon the court and the parties by the necessity of also determining in the common litigation those issues which may be several. See McGrath v. Tadayasu Abo, 186 F. 2d 766, 774 (9th Cir. 1951).

(14) Finally, appellees argue that the complaints do not satisfy the requirement of Rule

23(a)(3) that 'common relief' be sought, since counts 2 and 3 seek rescission and return of consideration as to those investors who still own the securities, and damages as to those who do not. But in the last analysis, each member of the class seeks a money judgment in the amount required to make him whole.⁸"

(ii) A CLASS ACTION IS SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY. Most class members would have no remedy at all if this action did not proceed as a class action. Many claimants, each with a small claim, will not individually be able to proceed against defendant-appellee. Additionally, plaintiffs-appellants' former Union presently has a balance sheet showing only the sum of \$1,613.29. Thus, a class action is the only feasible mode of vindicating plaintiffs-appellants' rights.

In determining the superiority of a class action, four factors are listed in Rule 23(b)(3): (A), (B), (C), (D).

One of the four factors is Factor (A) "the interest of members of the class in individually controlling the prosecution or defense of separate actions." A class action is superior because few of the plaintiffs-appellants can afford to bring an individual action. Moreover, even if any separate suit were to be commenced during the pendency of this litigation, that individual's interest in litigating separately would be safeguarded by his right to opt-out under 23(c)(2).

Factor (B) is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." There is no other litigation involving these issues now pending. Hence, there are not present alternatives to this class suit. Additionally, no one else has expressed an

interest in separate actions. Factor (B) obviously is satisfied.

Factor (C) is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." It is virtually certain that because of the predominance of common issues and the number of individuals involved, a class action will "achieve economies of time, effort, expense, and promote uniformity of decisions as to persons similarly situated." Adv. Comms Notes, 39 FRD, 98, 102, 103 (1966). Furthermore, individual suits are in general impractical because the claims of some prospective plaintiffs-appellants are relatively small, and this would give defendant-appellee an unfair advantage, "which would be almost equivalent to closing the door of justice to all small claimants." Weeks v. Baraco Oil Co., 125 F 2d 84, 90 (7th Cir, 1941). See Adv. Comms Notes, 39 FRD, 98, 104. Additionally, many of the members of the class now reside in the Rochester, New York area. For the above reasons, any redress should be concentrated in one particular forum in the class action.

Factor (D) is "the difficulties likely to be encountered in the management of a class action." The difficulties likely to be encountered in the management of this class action are small. The class has been narrowly and specifically defined. Its size is not unreasonably large. Because the names of all class members are available, it is possible to afford personal notice to almost everyone involved. Presumably, those whose addresses prove "unknown" can be reached by publication. Such notice for this group comports with the notion of "the best notice practicable under the circumstances," and also satisfies the requirement of Due Process. See Mullane v. Central Hanover Bank & Trust Co., 339 US 306 (1950).

Thus, plaintiffs-appellants have also satisfied the requirement of Paragraph (b)(3) of Federal Rule of Civil Procedure 23.

POINT VI

CLASS ACTION CERTIFICATION IS PROPER IN LITIGATION TO COMPEL PENSION PAYMENTS.

The Courts have certified pension litigation suits as class actions. In view of the large numbers of workers covered by pensions, and in view of common questions of law or fact pertaining to pension disputes, the Courts recognize that economies of time and expense can be obtained through class action certification of pension litigation. Regardless of the theory of recovery asserted by the aggrieved parties, Courts have often certified pension litigation as class actions.

In Schneider v. Electric Auto-Lite Company, 456 F2d 366 (6th Circuit, 1972) former employees brought a class action for damages against a former employer which had permanently shut down its plant in Toledo, Ohio. The suit was brought in the United States District Court for the Northern District of Ohio, and jurisdiction was under Section 301 of the Labor-Management Relations Act. The Court awarded pro-rata vacation pay and present value of pension rights to the former employees. On appeal to the United States Court of Appeals for the Sixth Circuit, it was held that a class action was proper. There were approximately 300 individuals in the class. Further, the Court of Appeals held that the grievance procedure in the collective bargaining agreement was inapplicable, and that such procedures need not be exhausted as a prerequisite to the suit.

The Schneider case, supra, is similar to the present case by plaintiffs-appellants. In both cases, the actions were brought by former employees. In both cases, jurisdiction was under Section 301 of the Labor-Management Relations Act. In both cases, the size of the class was about 300 individuals. In both cases, the former employer shut down its plant. In both cases, the former employees sought to recover pensions.

Thus, class action certification is appropriate to the subject matter of this suit--an action to compel pension payments.

CONCLUSION

THE DECISION BELOW SHOULD BE REVERSED BECAUSE THE DECISION BELOW IS THE DEATH KNEEL OF THIS ACTION; BECAUSE THE DISTRICT COURT ERRED IN HOLDING THAT THERE IS NO SHOWING THAT THE INTERESTS OF MEMBERS OF THE VARIOUS SUBCLASSES WILL BE FAIRLY AND ADEQUATELY PROTECTED; BECAUSE THE DECISION BELOW IS CONTRARY TO THE POLICY BEHIND FEDERAL RULES OF CIVIL PROCEDURE 23; BECAUSE THIS ACTION SATISFIES THE PREREQUISITES FOR THE MAINTENANCE OF A CLASS ACTION IN RULE 23(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE; BECAUSE THIS ACTION IS MAINTAINABLE AS A CLASS ACTION UNDER PARAGRAPH (b) OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE; AND BECAUSE CLASS ACTION CERTIFICATION IS PROPER IN LITIGATION TO COMPEL PENSION PAYMENTS.

Respectfully submitted,

SNYDER AND SNYDER
Attorneys for Plaintiffs-
Appellants
Office and P. O. Address
31 East Main Street
Rochester, New York 14614

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.
☐ Attorney's Affirmation shows: deponent is

Check Applicable Box

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

☐ Individual Verification the being duly sworn, deposes and says: deponent is in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as those matters deponent believes it to be true.
☐ Corporate Verification the of in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at upon deponent served the within

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

The name signed must be printed beneath

NOTICE OF ENTRY

Index No.

Year 19

Sir:—Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

SNYDER and SNYDER

Attorneys for

Office and Post Office Address

**31 Main Street East
ROCHESTER, NEW YORK 14614**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.,

SNYDER and SNYDER

Attorneys for

Office and Post Office Address

**31 Main Street East
ROCHESTER, NEW YORK 14614**

To

7

Attorney(s) for

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**SAMUEL JELFO,
JOSEPHINE TAYLOR and
EDISON C. SCHULZ,**
on behalf of themselves and
all others similarly situated,
Plaintiffs-Appellants

-VS-

HICKOK MANUFACTURING COMPANY, INC.,
Defendant-Appellee

ORIGINAL

BRIEF FOR PLAINTIFFS-APPELLANTS

SNYDER and SNYDER

Attorneys for **Plaintiffs-Appellants**

Office and Post Office Address, Telephone

**31 Main Street East
ROCHESTER, NEW YORK 14614
(716) 546-7258**

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated, July 7, 1975

by Harris Beach and Wilcox
Attorneys

Attorney(s) for